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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 703.

OLD COLONY TRUST COMPANY, TRUSTEE,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR THE PETITIONER.

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TABLE OF CONTENTS.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	4
Specification of Errors	10
Summary of Argument	11
Argument	13
I. The Contributions made during 1931 were Deductible as Payments made for Charitable Purposes pursuant to the Terms of the Trust Instrument	13
1. The Construction given by the Majority of the Circuit Court of Appeals to the Words "Pursuant to the Terms of the Will or Deed creating the Trust" is manifestly wrong	13
2. The Majority of the Board of Tax Appeals erred in holding that the Taxpayer must affirmatively prove that the Payments in Question were actually made out of Money received during 1931 and not from accumulated Income on Hand at the Beginning of the Year	24
II. If the Payments in Question are disregarded, the Receipts of the Trust for 1931 (above the Amounts required to pay Annuities and Expenses) constituted Income "to be used exclusively" for charitable Purposes	28

TABLE OF CITATIONS.

Cases.

	Page
Bartlett, petitioner, 163 Mass. 509	38
Binney v. Long, 299 U.S. 280	30, 31
Blair v. Commissioner, 299 U.S. — (Feb. 1, 1937)	37
Boston Safe Deposit & Trust Co. v. Commissioner, 66 F. (2d) 179	20, 30
Bowers v. Slocum, 20 F. (2d) 350	22
Boyden v. Stevens, 285 Mass. 176	40
Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513	39
Burnet v. Whitehouse, 283 U.S. 148	22
Charles P. Moorman Home for Women v. United States, 42 F. (2d) 257	22
Cochran v. United States, 254 U.S. 387	34, 37
Codman v. Brigham, 187 Mass. 309	39
Coolidge v. Long, 282 U.S. 582	30, 31
Corkery v. Dorsey, 223 Mass. 97	40
Cummings v. Cummings, 146 Mass. 501	36
DeGanay v. Lederer, 250 U.S. 376	19
Dexter v. Episcopal City Mission, 134 Mass. 394	38
First National Bank of Boston v. Truesdale Hospital, 288 Mass. 35	32
General Utilities & Operating Co. v. Helvering, 296 U.S. 200	14
Guaranty Trust Co. v. Commissioner, 31 B.T.A. 19	20, 21
Guffey v. Smith, 237 U.S. 101	37
Hartford-Connecticut Trust Co. v. Eaton, 36 F. (2d) 710 (affirming 29 F. [2d] 840)	12, 29
Hartford-Connecticut Trust Co. v. Eaton, 41 F. (2d) 69	29
Helvering v. Bliss, 293 U.S. 144	14
Helvering v. Pardee, 290 U.S. 365	21

	Page
Henry v. United States, 251 U.S. 393	33
Hughes v. Buckland, 15 M. & W. 346	17
Ithaca Trust Co. v. United States, 279 U.S. 151	31
Kent v. Great Western Ry. Co., 3 C.B. 714	17
Kirwin v. Attorney General, 275 Mass. 34	39
Lawless v. Sullivan, 6 A.C. 373	19
Lederer v. Stockton, 260 U.S. 3	13, 26
Lincoln v. Ricketts, 297 U.S. 373	14
Miller v. Robertson, 266 U.S. 243	19
Minot v. Baker, 147 Mass. 348	39
Mississippi Valley Trust Co. v. Commissioner, 72 F. (2d) 197	21
Ocean Coal Co. v. Davies, [1927] A.C. 271	18
Old Colony Railroad Co. v. Commissioner, 284 U.S. 552	19
Portland, The, 273 Fed. 401	19
Potter v. Realty Securities Co., 77 Fla. 768	18
Saltonstall v. Sanders, 11 Allen, 446	39
Sears v. Hardy, 120 Mass. 524	38
Simpson v. United States, 252 U.S. 547	34
Tax Commissioner v. Putnam, 227 Mass. 522	36
Tirrell v. Commissioner of Corporations & Taxation, 287 Mass. 464	36
Treadwell v. Cordis, 5 Gray, 341	38
Tyler v. United States, 281 U.S. 497	37
Waterhouse v. Keen, 4 B. & C. 200	17
Weber v. Bryant, 161 Mass. 400	39
Williams v. Bradley, 3 Allen, 270	39
Williams v. Milton, 215 Mass. 1	36
Williams v. Thacher, 186 Mass. 293	38
Wilson v. Wilson, 145 Mass. 490	39

Textbooks.

	Page
Black's Law Dictionary (3d Ed.)	15
New Standard Dictionary	15
Paul and Mertens on Federal Income Taxation	24, 26
Webster's New International Dictionary (2d Ed.)	15

Constitution of the United States.

Article VI	16

Statutes.

Judicial Code, §240 (as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938)	2
Revenue Act of 1918, §219	22
Revenue Act of 1918, §403 (a) (3)	31
Revenue Act of 1928, §23	2n.
Revenue Act of 1928, §120	13
Revenue Act of 1928, §162	2, 22
Revenue Act of 1928, §162 (a)	2, 6, 7, 10, 12, 26, 27
Revenue Act of 1928, §162 (b)	3
Revenue Act of 1928, §162 (c)	3, 19
U.S. Code, Title 28, §347 (a)	2
Workmen's Compensation Act, 1923 (13 & 14 Geo. 5, c. 42) §14	18

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v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR THE PETITIONER.

This court on March 15, 1937, granted a writ of certiorari to review a decision (R. 84) rendered on December 10, 1936, by the United States Circuit Court of Appeals for the First Circuit upon cross-petitions for the review of a decision of the Board of Tax Appeals.

Opinions Below.

The majority and minority opinions of the Board of Tax Appeals are reported in 33 B.T.A. 311; those of the Circuit Court of Appeals are found in 87 F. (2d) 131.*

* The dissenting opinion of Judge Morton, as it appears in the Federal Reporter, was evidently printed from an uncorrected copy. The third sentence of the second paragraph should read "The majority opinion holds," etc., instead of "The Board of Tax Appeals held" (R. 83).

Jurisdiction.

This court has jurisdiction to review the decision of the Circuit Court of Appeals under 28 U.S.C. §347 (a) (Judicial Code, §240, as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938).

Questions Presented.

As will be seen from the several opinions of the Board of Tax Appeals and of the Circuit Court of Appeals, the case turns upon the construction of Section 162 of the Revenue Act of 1928, which in its material part is as follows:—

> "*Sec. 162. Net income.* The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> "(*a*) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 [n]*) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the

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* The material part of §23 of the Revenue Act of 1928 is as follows:—

"In computing net income there shall be allowed as deductions:

• • • • • • • • •

"(*n*) *Charitable and other contributions.*—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

"(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

"(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings

purposes and in the manner specified in section 23 [n], or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

"(*b*) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection [c] of this section in the same or any succeeding taxable year;

"(*c*) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in comput-

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of which inures to the benefit of any private shareholder or individual;

* * * * * * * * * *

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)"

ing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

The issue is whether, in computing the net income of the petitioner for 1931 as trustee under the deed of trust referred to below, the petitioner is entitled to a deduction equal to the excess of income over the sums required to pay the expenses and certain annuities either (*a*) because the trustee during the same year made contributions out of income to charitable purposes aggregating more than this excess or (*b*) because the entire excess was in view of the terms of the trust "to be used exclusively" for charitable purposes.

Statement.

The facts were stipulated before the Board of Tax Appeals (R. 18-50) and are in substance as follows:—

Paul Wilde Jackson, by a deed dated July 19, 1922 (R. 24) transferred to the Old Colony Trust Company and George E. Brock (who died in 1923, leaving the Old Colony Trust Company sole trustee) property of large value in trust to make various outright payments not now material (R. 23, 51) and to pay annuities in specified amounts to various individuals. The deed then continued as follows (R. 29):—

"13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have

yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund."

According to the introductory recitals of the deed, the settlor's purpose was to carry out the wishes of his brother Henry Clay Jackson, who had been prevented by death from executing a will and from whom the settlor had inherited the property in question (R. 24; see also the letter of Arthur T. Johnson, Esq., who was Henry Clay Jackson's legal adviser, R. 46).

The income of the trust for each year since the petitioner has held the prinicpal has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust (R. 20).

The first receipt of principal by the petitioner under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal and for the income were opened. The first receipt of income was on June 30, 1923.

The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payments or payments to charitable organizations have been charged on the books to the principal account (R. 20). The trustee's returns have been made upon a cash receipts and disbursements basis (R. 24, 54).

The market value of the trust corpus was $2,119,835.81 on January 1, 1931, and $1,488,140.43 on December 31, 1931 (R. 22). The accumulated income on hand January 1, 1931, was $187,999.43 (R. 54).

The gross income for the year 1931, exclusive of gains, was found by the Board of Tax Appeals to have been $114,417.36 (R. 54). The Board found that in the same year the trust received from the sale of securities income of $60,901.82 (R. 54). The gross income of the trust for 1931 therefore amounted in all to $175,319.18, whereas the total of the annuities distributed or distributable in that year was $22,900 (R. 54). Deducting from this total $22,350 (which was the amount actually paid out during 1931 on account of the annuities) and $11,029.79 on account of expenses there remained a balance of $141,939.39 available for charities (R. 54, 59).

During the year 1931 the trustee paid to various institutions (each of which was admittedly charitable within the meaning of §162 [a] of the Revenue Act of 1928) a total of $190,000, all of these payments being shown in the books of the trust as payments out of income (R. 21-22, 54).

The cost of procuring annuities for all of the annuitants, if purchased during the first six months of 1931 from the New York Life Insurance Company, would have been $200,804.33 (R. 23, 54).

The petitioner filed a fiduciary return for 1931 showing income apportioned to the annuitants and to itself (R. 19). It also filed an individual return for the same year in which it claimed as deductions on account of sums set

aside for charitable and religious purposes amounts equal in the aggregate to the total net income, including capital gains (R. 19). The Commissioner disallowed all these deductions (R. 20). The sole reason assigned by the Commissioner for disallowing deductions on account of the sums applied to charity was that it was "not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity" (R. 11).

At the hearing before the Board of Tax Appeals, as is apparent from the several opinions, it was not contended by the Commissioner that the payments in question were not made "pursuant to the terms of the . . . deed creating the trust" within the meaning of §162 (a) of the Revenue Act of 1928 and the hearing proceeded on the footing that they were so made. The question considered was whether it was necessary for the trustee, in order to enjoy the benefit of the deduction, to show that the payments were made out of income received during the year current. The Board unanimously held that the payments in question were not made out of principal (R. 57, 59).

The majority held that, in view of the possibility that accumulated income might in some future year be used for annuity payments, the income received by the trust during 1931 and not required for expenses or for the annuity payments of that year did not constitute income "to be used exclusively" for charitable purposes within the meaning of the statute and that, as regards sums actually paid to charitable institutions during 1931, it was incumbent upon the trustee to prove affirmatively that the sums in question were paid out of income received in the same year; it was said that "the deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years" (R. 58). The majority found that contributions aggregating $2,007.57 were in-

dubitably made from the gross income of 1931 and might, therefore, be claimed as deductions, but held that as to the balance of the contributions in question (aggregating $187,999.43) the trustee had not sustained the burden of proof and that in consequence this balance was not deductible; according to the majority the Board had no way of determining how much of the payments in excess of $2,007.57 "might have been made from 1931 income and how much from prior accumulations" (R. 58).

The minority, without undertaking to determine whether the income in question was "to be used exclusively" for charitable purposes, held in substance that the deduction should be allowed on the ground that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions and that it is immaterial whether the trustee takes the money so applied out of income actually received during the current year or takes it out of income on hand at the beginning of the year and suffers the income thereafter received to accumulate (R. 59).

Both parties petitioned the Circuit Court of Appeals for the First Circuit to review the decision of the Board of Tax Appeals. The trustee assigned as error the Board's holdings "that gifts made to charities in 1931 were not deductible unless shown to have been made from gross income received by the trust in that year" and "that the difference between the petitioner's net income for 1931 as determined by the respondent and the amounts paid to annuitants was . . . [not] to be used exclusively for charitable purposes within the meaning of Section 162 (a) of the Revenue Act of 1928" (R. 67). The Commissioner assigned as error the Board's failure to hold "that the amount of $2000.57 was paid out of the corpus of the estate created under the trust indenture" (R. 74); in no assignment of error was it

suggested that the payments in question were not made "pursuant" to the terms of the trust instrument within the meaning of the statute.

At the hearing in the Circuit Court of Appeals the Commissioner put forward as his principal reliance a contention that none of the contributions, even if unquestionably made out of income received during the same year, were deductible, because the deed did not imperatively require them to be made but gave the trustees power to make them as a matter of discretion; it was said that for this reason the payments could not be deemed to have been made "pursuant to the terms of the . . . deed creating the trust." The trustee argued that the Board of Tax Appeals rightly proceeded on the assumption that the words "pursuant to" were to be taken in their normal sense of "agreeably to" or "in accordance with"; as to the points considered by the Board the trustee reiterated in substance its former arguments.

The majority of the Circuit Court of Appeals, while overruling the Commissioner's contention that the payment of $2,000.57 above mentioned was not made from income, sustained his contention as to the meaning of the words "pursuant to" and, without passing upon the question upon which the Board of Tax Appeals had been divided, ordered the case remanded to the Board with instructions to reinstate the Commissioner's determination *in toto* (R. 77, 84). Judge Morton filed a dissenting opinion (R. 82).

Specification of Errors.

Since the point on which the case chiefly turned in the Circuit Court of Appeals was not considered by the Board of Tax Appeals and was not referred to in the assignments of error filed with the respective petitions for review, a repetition of these assignments would be unprofitable. The petitioner's objections to the decision of the Circuit Court of Appeals may, however, be summarized as follows:—

1. The Circuit Court of Appeals erred in holding that the contributions made during 1931 were not deductible as payments made for charitable purposes pursuant to the terms of the trust instrument:—

(*a*) Because there is no warrant for taking the words "pursuant to the terms of the . . . deed creating the trust," as used in §162 (a) of the Revenue Act of 1928, to mean "as imperatively required by the terms of the deed," instead of taking these words in their normal sense of "agreeably to the terms of the deed" or "conformably to the terms of the deed";

(*b*) Because, as was held by the minority of the Board of Tax Appeals, it was not incumbent on the trustee to prove affirmatively that the funds used in making the contributions in question were the identical funds received during the taxable year.

2. The Circuit Court of Appeals further erred in not sustaining the trustee's contention that, if the contributions made during 1931 were not deductible as sums paid during the taxable year for charitable purposes "pursuant to the terms of the deed," the income received in 1931 was on any theory "to be used exclusively" for charity within the meaning of the statute, the existence of a condition subsequent whereby accumulated income might theoretically be drawn upon to meet future annuity payments being immaterial for this purpose.

Summary of Argument.

1. The payments actually made to charitable institutions by the petitioner constituted within the meaning of the statute "gross income . . . , which pursuant to the terms of the . . . deed creating the trust, . . . [was] during the taxable year paid . . . for . . . charitable . . . purposes."

(*a*) The deed of trust by its express terms authorized the trustees to make these payments. They were therefore made "pursuant to" the terms of the deed. If it was competent for the Commissioner to insist for the first time at the argument before the Circuit Court of Appeals that the payments in question were not made "pursuant to" the terms of the trust instrument, the construction put upon these words by the majority of the Circuit Court of Appeals is plainly wrong. As pointed out in the dissenting opinion, this construction is not only inconsistent with the policy of Congress in encouraging contributions to charity, but is repugnant both to common usage and to substantially all the authorities, both federal and otherwise.

(*b*) It was not incumbent upon the petitioner, as assumed by the majority of the Board of Tax Appeals, to prove affirmatively that the payments in question were actually made out of money received during 1931 and not from accumulated income on hand at the beginning of the year. In view of the presumable purpose of Congress, the provision that a trustee may deduct "any part of the gross income . . . , which . . . is during the taxable year paid" to charitable institutions manifestly means that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions. Any other construction would render largely nugatory the provision for the deduction of contributions by trust estates to charity, since the practical exigencies

of administration often make it necessary to carry over income from one year to another and impossible to determine whether a particular payment is made from funds received during the current year.

2. If the payments in question are disregarded, the receipts of the trust for 1931 (above the amounts required to pay annuities and expenses) constituted income "to be used exclusively" for charitable purposes. The trust deed provides that the entire estate, both principal and income, be applied, except so far as necessary for the purposes of the annuities, to charity. The excess in the income for 1931 over the limited amount required for the annuity payments of that year thus became charged with a charitable trust, subject to the condition subsequent that in some future year the trustee might draw upon it to provide the annuity payments then accruing. As was held by the Circuit Court of Appeals for the Second Circuit in *Hartford-Connecticut Trust Co.* v. *Eaton,* 36 F. (2d) 710 (affirming 29 F. [2d] 840) the excess of the receipts over the aggregate of the annuity payments for the current year constitutes income "to be used exclusively for religious, charitable, scientific or educational purposes" within the meaning of §162 (a) of the Revenue Act of 1928, notwithstanding the possibility that through the operation of the condition subsequent such excess might later be diverted to a non-charitable use, especially in view of the fact that the annuities are so small with reference both to the principal and to the income of the estate that this possibility of future diversion is purely theoretical.

Argument.

I.

THE CONTRIBUTIONS MADE DURING 1931 WERE DEDUCTIBLE AS PAYMENTS MADE FOR CHARITABLE PURPOSES PURSUANT TO THE TERMS OF THE TRUST INSTRUMENT.

1. The Construction given by the Majority of the Circuit Court of Appeals to the Words "Pursuant to the Terms of the Will or Deed creating the Trust" is manifestly wrong.

The importance of this question is obvious. The court will take notice of the fact that there are great numbers of trust instruments in which it is left to the discretion of the trustees to apply the income either to charitable or to non-charitable purposes as they may from time to time determine. The effect of the decision is that, although an individual who elects to make contributions to charity is allowed a deduction equal to 15 per cent. of his net income,—or even to a greater exent in certain cases; see §120 of the Revenue Act of 1928,—the income of a trust created by such an instrument is taxable without deduction even if the whole amount is contributed to charity. This result is so anomalous that it cannot in the absence of most positive language be supposed to have been the intention of Congress.

As this court has often recognized,—*e.g.*, in *Lederer* v. *Stockton*, 260 U.S. 3,—the successive revenue acts have disclosed a policy of encouraging contributions to charity by permitting such contributions to be deducted and the provisions for deductions of this class have been progressively more liberal. The individual may, of course, "do what he will with his own"; in order to encourage him to apply a part of his income to charity, he is allowed a deduction on account of contributions within specified limits. It is well-nigh inconceivable that, when Congress came to

deal with contributions by trust estates, it should have intended to reverse this policy and to offer a trustee having power to apply income to charity no inducement whatever to do so. In any event, no such intent can be attributed to Congress when it can be read into the statute only by disregarding the normal meaning of the words and taking them in a strained and unnatural sense.

Lincoln v. *Ricketts*, 297 U.S. 373, 376.

Any such departure from the ordinary meaning of the words is peculiarly obnoxious in construing a provision intended to encourage gifts to charity.

Helvering v. *Bliss*, 293 U.S. 144, 150.

That the meaning given by the Circuit Court of Appeals to the words "pursuant to" is not that which the words normally carry is suggested by the fact that it appears never to have occurred to the Commissioner, when assessing the tax, or to the Board of Tax Appeals that they might be so construed. As already pointed out, the Commissioner's denial of the deduction was put on an entirely different ground (R. 11). While the arguments before the Board of Tax Appeals are not in the record, it is patent that no such contention was made before the Board; although the Board was sharply divided upon another aspect of the case, each of the three opinions proceeds without discussion upon the assumption that the payments in question were made "pursuant to" the terms of the deed. It is, indeed, only upon a very liberal construction of the rule applied in *General Utilities & Operating Co.* v. *Helvering*, 296 U.S. 200, that it can be said to have been competent for the Commissioner under his general assignment of error,—"the Board erred in holding that the taxpayer was entitled to a deduction from gross income for the year 1931 of an amount of $2,000.57 paid to charitable organizations"

(R. 74),—to argue that the payments were not made "pursuant to" the terms of the deed; even if the argument was open, the frame of the several assignments shows clearly that no such idea was in the mind of counsel when they were prepared. The decision of the Circuit Court of Appeals, therefore, is in effect that a construction so recondite that it did not occur to anybody prior to the argument before that court must be adopted in the face of the overwhelming probability that the intention of Congress was just the contrary.

"Pursuant" is not a word of art, but has a perfectly well established meaning in common speech. Thus in Webster's New International Dictionary (2d Ed.) p. 2018, "pursuant" is defined as follows:—

> "Acting on, done in consequence of or in prosecution (of anything); hence, agreeable; conformable; following; according;—with *to* or *of*."

The definition in the New Standard Dictionary, p. 2014, is similar:—

> "In accordance; agreeably; conformably; usually with *to*."

So, in Black's Law Dictionary (3d Ed.) p. 1469, "pursuant" is defined as "conformable to, agreeable to, or in accordance with."

To settle the present question it is hardly necessary to do more than to ask what the meaning of the statute would be if, instead of the words "pursuant to," it used one of the terms thus recognized by the dictionaries as synonymous. If, for example, the statute spoke of contributions made "agreeably" to the terms of the trust instrument, no one would imagine that a contribution authorized by the trust instrument was not made "agreeably" to its terms, even if not imperatively required. The same would

be true if the statute spoke of contributions made "in accordance with" or "conformably to" the terms of the instrument.

If carried out consistently, the meaning given by the majority of the Circuit Court of Appeals to the words "pursuant to" would lead to surprising results. For example, the Constitution of the United States (Article VI) provides that "this Constitution, and the laws of the United States which shall be made in pursuance hereof, . . . shall be the supreme law of the land." No one has ever suggested that the "laws of the United States" thus referred to are only those which it is the imperative duty of Congress to enact; it has always been assumed that "made in pursuance thereof" is equivalent to "made in the exercise of authority conferred thereby." If the decision of the Circuit Court of Appeals is right, however, this fundamental provision has only a very narrow operation; an act passed by Congress in the exercise of discretion is not "the supreme law of the land," but may be overridden by the States *ad libitum*.

The general concurrence of the courts in the views of the lexicographers appears from the decisions cited by Judge Morton in his dissenting opinion. In his brief in opposition to the petition for certiorari the respondent said that this opinion was based on the meaning "thought to be given to 'pursuant to' in two old statutes and indictments unrelated to the necessities of a workable scheme of taxation." As to this it may justly be asked what the "necessities of a workable scheme of taxation" have to do with the question; the respondent has not suggested any reason why the statute is not just as workable if the words "pursuant to" are taken in their normal sense as if they are given an unnatural meaning. With regard to the authorities, it may be said that, if they do not deal with the phrase as it appears in the particular connection now

under consideration, this is because nobody has heretofore had the temerity to argue that it has in that connection the significance which the respondent seeks to attach to it.

If cumulative authority as to the ordinary meaning of "pursuant to" is called for, however, it can readily be supplied. Illustrations may, for example, be taken from the large group of cases dealing with statutes limiting the liability of persons acting "in pursuance" thereof. Thus in *Kent* v. *Great Western Ry. Co.*, 3 C.B. 714, the defendants' charter purported to limit their liability "for any thing done, or omitted to be done, in pursuance of this act." Maule, J., said (at p. 725; italics supplied):—

> "I think the subject-matter of charge in this action [an alleged overcharge for the conveyance of merchandise] clearly was a thing done, or omitted to be done, in pursuance of the act. The act *enables* the company to carry goods, charging a sum consisting of such toll as they choose to take, plus a reasonable sum for the carriage. The plaintiff and the defendants are in reality trying . . . whether, under the act, the defendants were *entitled* to charge certain prices."

So, in *Waterhouse* v. *Keen*, 4 B. & C. 200, which was a similar action against the proprietor of a turnpike, Holroyd, J., said (at p. 213; italics supplied):—

> "The action . . . in substance . . . is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, *under color of the authority of the act.* The demanding and taking the toll was an act done in pursuance of the act. This is a case therefore within the words of the act."

Again, in *Hughes* v. *Buckland*, 15 M. & W. 346, a landowner assumed to act under a statute authorizing him to

arrest trespassers. It turned out that the place of the alleged trespass was actually on the land of a third person, though believed by the defendant to be on his own land. Parke, B., said (at p. 355; italics supplied):—

> "The act is general in its terms, and gives protection to all persons for all acts done in pursuance of it. Those words do not mean acts done in strict pursuance of the act, because, in such a case a party would be acting legally, and therefore would not require protection. The words, therefore, must be qualified by the decisions; and then the meaning will be that a party to be entitled to protection must bona fide and reasonably believe himself to be *authorized by the act.*"

The phrase "in pursuance of," as used in the Workmen's Compensation Act, 1923 (13 & 14 Geo. 5, c. 42) §14, has been similarly interpreted. In *Ocean Coal Co.* v. *Davies*, [1927] A.C. 271, Lord Atkinson said (at p. 284; italics supplied):—

> "The main reliance of the respondent was . . . on the first four and a half lines of . . . §14. . . . Under this section . . . [the employer] may . . . terminate the weekly payment if, in the doing of that, he acts 'in pursuance of an agreement or arbitration.' If anything is clear I should think it is that the words 'pursuance of an agreement or arbitration' mean in this connection simply *the doing of what an agreement or an arbitration authorizes and entitles the employer to do.*"

So, in *Potter* v. *Realty Securities Co.*, 77 Fla. 768, the court said (at p. 772):—

> "Pursuant means conformable to, agreeable to, or in accordance with."

It cannot, however, be necessary to multiply authorities on a point so obvious. The question is rather as to what the respondent can show to overcome the strong presumption that the phrase was not used in the abnormal sense insisted upon.

Old Colony Railroad Co. v. *Commissioner*, 284 U.S. 552, 561.
Miller v. *Robertson*, 266 U.S. 243, 250.
DeGanay v. *Lederer*, 250 U.S. 376, 381.

In the brief filed in opposition to the petition for certiorari reference was made to §162 (c) of the Revenue Act of 1928 and it was said that "Congress when it meant discretion of the trustee expressly so stated in §162 (c) which follows almost immediately after the provision in question here." A reading of §162 (c), however, shows that it relates to an entirely different subject and that its general frame is such that the use of the phrase "pursuant to" would have been most awkward. Such a difference in phraseology is of no consequence, when the diversity manifestly results from differences in the structure and subject matter of the respective sections.

The Portland (C.C.A. 9) 273 Fed. 401, 403.

In *Lawless* v. *Sullivan*, 6 A.C. 373, the controversy arose under a statute imposing a tax on the "income" of banks and certain other corporations. The taxing authorities maintained that, in computing the taxable "income," losses must be disregarded, in view of the fact that in another section of the statute (relative to insurance companies) the basis of the tax was referred to as the "net profits." In reply to the argument that "the Legislature would have said net profits if they had so intended" Sir Montague E. Smith remarked (at p. 375): "The burden is on those who

seek to put the most onerous meaning on words used to show clearly that that meaning was intended"; he further said in delivering the opinion of the Judicial Committee (at p. 382):—

> "It was argued that the words 'net profits' appearing in these enactments raised a strong implication that the Legislature meant by 'income' something different from 'net profits.' This argument has undoubtedly some force, but is not of sufficient cogency to justify an interpretation being given to the word 'income,' as applied to a commercial business, other than that which it naturally bears. The employment of different language in the same Act may, in some cases, help to show that the Legislature had in view different objects, but a change in language cannot be relied on as furnishing a general rule of construction, and the weight to be given to such changes must depend on a view of the entire enactments in which they occur, and the degree of ambiguity existing in the language to be construed."

The respondent has cited *Boston Safe Deposit & Trust Co.* v. *Commissioner* (C.C.A. 1) 66 F. (2d) 179, and *Guaranty Trust Co.* v. *Commissioner*, 31 B.T.A. 19, in support of the proposition that "deductions under §162 (a) for amounts which pursuant to the terms of a trust deed are permanently set aside for charitable purposes cannot be had when such amounts in the discretion of the trustee under possible exigencies of the trust can be used for other than charitable purposes." As to this it is enough to say that in neither case had there been any attempt to impose a tax with respect to funds actually paid for charitable purposes or irrevocably appropriated to charitable uses. In neither was there any intimation that, if payment had

been made or an irrevocable appropriation effected, the sums so paid or appropriated would have been taxable; the whole controversy was as to income which had been retained by the trustees and which it was competent for them to apply in the future to non-charitable purposes. Indeed, in *Guaranty Trust Co.* v. *Commissioner*, the Board expressly said (31 B.T.A., at p. 22; italics as in the original), "Respondent has made no attempt to lay a tax upon those amounts *actually paid* for the uses of the home."

The respondent has further asserted that "it is settled in the case of estate taxes that specific gifts to charitable institutions are exempt, while charitable gifts left to the discretion of a fiduciary under the terms of the will are taxable," citing *Mississippi Valley Trust Co.* v. *Commissioner* (C.C.A. 8) 72 F. (2d) 197, and *Helvering* v. *Pardee*, 290 U.S. 365, 370. The short answer to this is that the statutory provisions with respect to the estate tax are entirely different both in form and in substance and do not contain either the words "pursuant to the terms of the will" or any similar phrase; these provisions have no tendency to show that Congress in the section now under consideration used this familiar phrase in any but its normal sense.

In this connection the respondent has argued that "the deduction should be denied for an additional reason, namely, that the deed of trust did not direct that payments be made *from income*" and that "it is settled that a trustee may not deduct payments to annuitants whose payments are not required to be made from income . . . and the same principle should be applicable here." This contention, it is submitted, necessarily falls as soon as it is determined that "pursuant to" is to be taken in its normal sense of "agreeably to" or "in accordance with." The statute provides that income paid "pursuant to the terms of the will or deed" shall be deducted. If this means that income paid to charity in the exercise of authority conferred

by the will shall be taxed, it is manifest that, if the trustee has discretion to pay to charity either from income or from principal and elects to pay from income, there is a payment from income "pursuant to the terms of the will or deed" as much as when the trustee, having discretion either to pay out income or to retain it, elects to pay it out.

Burnet v. *Whitehouse*, 283 U.S. 148, which may be cited by the respondent, is irrelevant for similar reasons. All that was decided in that case was that an annuity charged upon a trust estate generally constituted a gift as against the annuitant, so that income used to pay the annuity should be deemed for tax purposes the income of the trust and not that of the annuitant. The sections of the statute considered in that case contained no provision that payments from income to annuitants "pursuant to the terms of the will" should not be taxable as against the trustee and the opinion gives no remotest hint that, if there had been such a clause, it would not have been given effect.

Bowers v. *Slocum*, 20 F. (2d) 350, which is cited by the majority of the Circuit Court of Appeals, arose under §219 of the Revenue Act of 1918 (corresponding to §162 of the Revenue Act of 1928), but raised an issue entirely different from that now presented, *i.e.*, whether, if the trust instrument unequivocally directed that certain income be devoted to charity, the failure of the trustees to pay over such income or make appropriate entries in their books affected the right to claim a deduction; no question as to the exercise of a discretion given by the trust instrument was involved.

The majority of the Circuit Court of Appeals quote from the opinion of the District Court for the Western District of Kentucky in *Charles P. Moorman Home for Women* v. *United States*, 42 F. (2d) 257, language which may seem at first sight to support their conclusion. Upon examination, however, it will be found that in the Moorman case

no payments to charity had actually been made during the taxable year; the income, so far as not required for the support of the life tenant, had simply been allowed to accumulate. As the judge construed the will, the remainder interest to which the charitable use attached was contingent until the death of the life tenant, whose support constituted a first charge both on the income and on the principal. Thus the action of the trustee in assuming to earmark the unexpended income as appropriated to charity was merely officious. That the judge was not referring to a case like the present,—in which the trust instrument expressly gives the trustee authority to make outright gifts to charity in its discretion,—is shown by the following language (p. 260):—

> "As I view the law, if the instrument creating the trust clearly provides that the income of the trust as it accrues each taxable year shall be paid or permanently set aside to the charitable corporation, it will be exempt from taxation for each of the taxable years, notwithstanding the trustee may have failed or neglected either to pay it or permanently set it aside. On the other hand, if it appears from the instrument creating the trust that it was not the intention of the creator that any part of the income of the trust should be paid to or permanently set aside for the charitable corporation during the taxable year, the action of the trustee in paying or setting aside same during that year would not operate to exempt it from taxation."

It is thus patent that the language which precedes this passage and which is quoted by the majority of the Circuit Court of Appeals (R. 79) simply means that a payment may not be deemed to have been made "pursuant" to the trust instrument if not contemplated by the instrument,

but made by the trustee *suo motu;* in 4 Paul and Mertens on Federal Income Taxation, §34.60, it is so interpreted. It is hardly necessary, moreover, to suggest that, even if not thus susceptible of ready explanation, the opinion of a single district judge would be a slender foundation upon which to rest a decision which is right in the teeth of all the other authorities; the opinion has been examined in order to show that the position taken by the majority of the Circuit Court of Appeals has not even this slight support.

The majority opinion, in short, gives the statute an interpretation contrary to all the authorities and to the manifest intention of Congress. The decision means that the many trust estates established by instruments giving a discretionary power to apply income to charity must pay a tax on their entire income, even if every cent of it is actually and irrevocably paid over to charitable institutions during the year in which it is received. Such a conclusion, it is submitted, cannot stand.

2. *The Majority of the Board of Tax Appeals erred in holding that the Taxpayer must affirmatively prove that the Payments in Question were actually made out of Money received during 1931 and not from accumulated Income on Hand at the Beginning of the Year.*

As already pointed out, the proceedings before the Board of Tax Appeals were based on the assumption that the payments in question were made "pursuant" to the terms of the trust instrument. The Board had, moreover, no difficulty in finding that these payments were made out of income. The only reason why the deduction claimed by the taxpayer was not allowed in full was because it did not appear (except as to $2,000.57) that the actual money paid to charitable institutions during 1931 was taken from

income received during that year and not from income accumulated at the beginning of the year. The majority of the Board stated as follows their theory as to the decisive issue (R. 58):—

> "The question is, How much, if any, of the gross income of 1931 was paid to the charities in 1931 and thus used for charitable purposes pursuant to the terms of the deed creating the trust within the meaning of section 162 (a)? The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years."

If the majority of the Circuit Court of Appeals erred in holding that the payments in question were not made "pursuant to" the terms of the trust instrument, it will be necessary to decide whether the theory thus propounded by the majority of the Board is sound. The course of the case in the Circuit Court of Appeals and in this court suggests, however, that the question is not one of much difficulty. In the argument before the Circuit Court of Appeals the respondent made little attempt to sustain the view expressed by the majority of the Board. In the brief in opposition to the petition for certiorari the respondent did not venture to suggest that the construction given the statute by the majority of the Board could be supported. Analysis makes clear the respondent's reason for thus abandoning the main point relied upon by the majority of the Board and for seeking to reach the desired result by a wholly different route.

The proposition laid down by the majority of the Board is equivalent to saying that whether payments to charity are allowable as deductions depends, so to speak, upon the particular pocket out of which the trustee elects to take the money actually paid over. If carried to its logical conclusion this would mean that a trustee could obtain the

benefit of the deduction only if he kept the net income of each year in cash or its equivalent in a separate box or bank account and made all contributions out of that fund. The effect is to render the provision for deduction worthless to a trust estate conducted in the ordinary way; it is patent that the practical exigencies of such an estate must often make it necessary to carry over income from one year to another and impossible to determine whether a particular payment is made from the income of the current year.

The objections to such an ultra-literal and unreasonable interpretation of the statute are pointed out in the dissenting opinion of Board Member Smith (R. 59-60), which states the matter so clearly that little can be added. As observed in this opinion, the result is altogether out of harmony with the view expressed by this court in *Lederer* v. *Stockton*, 260 U.S. 3, *i.e.*, that the favor which Congress intended to extend to charitable gifts is not to be defeated by the mere form of the transaction. The views of the majority have likewise been questioned by Messrs. Paul and Mertens (4 Law of Federal Income Taxation, Supplement of 1936, p. 32).

There is, indeed, no difficulty in taking "any part of the gross income . . . , which . . . is during the taxable year paid or permanently set aside," etc., as meaning that payments which are as between trustee and beneficiary properly chargeable against the amounts constituting for tax purposes the gross income of the trust are to be allowed as deductions. It must be assumed that Congress in enacting §162 (a) took notice of the manner in which trust estates are commonly administered and did not intend to make the exemption depend upon the trustee's making a segregation which would never be made in ordinary accounting practice. It is likewise to be assumed that Congress had no purpose to establish a purely arbitrary distinction and to cause the right to claim the deduction to hinge on a mere accidental

circumstance having no relation to a policy which has run through the income tax laws from the beginning.

It is further to be noted that the deduction allowed to individuals on account of contributions to charity is in no way conditioned upon the source from which the contributions are taken. It is recited in §162 (a) that "there shall be allowed as a deduction (*in lieu of the deduction for charitable, etc., contributions authorized by section 23[n]*) any part of the gross income, *without limitation,*" etc. (Italics supplied.) It would surely be a strange thing to allow to estates and trusts "in lieu" of the limited deduction allowed individuals a deduction which purported to be "without limitation," but which was so restricted in another particular as often to be worthless.

It may be argued by the Commissioner that, even if the trustee is entitled to deduct contributions from income received in the form of interest, dividends, etc., it is not entitled to a deduction from gains on the sale of securities because the trustee, following its usual practice, carried such gains into its capital account. It would seem that there must be something wrong with an argument to the effect that the same items constitute income as against the taxpayer but not as against the government. It is unnecessary, however, to deal with this point in its broader aspects. As applied to the present case the argument fails because the trust deed gave the trustee power to apply both principal and income to charity. The test for purposes of deduction is whether the contributions were such as might properly be made out of the sums constituting gross income for tax purposes. It is plain that the contributions now in question might be so made regardless of whether the sums regarded as income for tax purposes were deemed principal or income as between the trustee and the beneficiaries. The Commissioner earnestly insists that the manner in which the trustee enters particular items in its books can-

not give rise to a deduction not otherwise permissible and, if this be the general rule, the trustee submits that it must work both ways.

The result is that the case should be disposed of on the short ground indicated by the dissenting members of the Board of Tax Appeals, *i.e.*, that the entire income of the trust for 1931 (less expenses and annuity payments) must be taken to have been paid for charitable purposes during that year.

II.

IF THE PAYMENTS IN QUESTION ARE DISREGARDED, THE RECEIPTS OF THE TRUST FOR 1931 (ABOVE THE AMOUNTS REQUIRED TO PAY ANNUITIES AND EXPENSES) CONSTITUTED INCOME "TO BE USED EXCLUSIVELY" FOR CHARITABLE PURPOSES.

There can be no pretence that the income of 1931, after deducting the sums necessary to meet the annuities and expenses of that year, was applied through any act of the trustee to non-charitable purposes. If it be assumed for the sake of argument that, either for the reason given by the majority of the Board of Tax Appeals or for that assigned by the majority of the Circuit Court of Appeals, the payments are not allowable as deductions, the case must stand as if those payments had not been made and as if the sums in question had been retained by the trustee. On this assumption the question is whether these sums constituted income "to be used exclusively" for charitable purposes within the meaning of the statute.

It is apparent that the provision as to amounts "to be used exclusively" for charitable purposes is complementary to the provision that amounts "paid or permanently set aside" for such purposes shall be deductible. The latter refers to sums applied to charity through some act on the part

of the trustee; the former covers moneys to which a charitable use attaches automatically by virtue of the trust instrument. It will doubtless be conceded by the respondent that, if under the terms of the trust instrument it was necessary that the sums in question be eventually applied to charity, the fact that they were not paid over during the taxable year would not be material. As the case actually stands, the entire trust property,—both principal and income,—is charged with a charitable use, subject to the condition subsequent that either principal or accumulated income may be used in the discretion of the trustee to meet annuity payments. In this aspect, therefore, the case raises a question as to which the Circuit Court of Appeals for the First Circuit and the Circuit Court of Appeals for the Second Circuit are in conflict. In the Second Circuit it has been held that, if the terms of the trust instrument are such that the income, as received, is charged with a charitable use, the existence of a condition subsequent whereby the sums in question may possibly be diverted to a non-charitable purpose does not prevent such sums from constituting income "to be used exclusively" for charitable purposes within the meaning of the statute.

Hartford-Connecticut Trust Co. v. *Eaton*, 36 F. (2d) 710, affirming 29 F. (2d) 840.

This decision has been followed by the District Court for the District of Connecticut in *Hartford-Connecticut Trust Co.* v. *Eaton*, 41 F. (2d) 69. In the case at bar, however, the majority of the Circuit Court of Appeals for the First Circuit dealt with the point as follows (R. 82):—

> "Nor can it be held that any part of the income for the year 1931 was, by direction of the trustor in the deed of trust, set aside permanently for charities, or to be

so used, since it might at any time be used for payments to charities in the discretion of the trustee whenever the income for any one year equaled twice the amount due the annuitants for that year. Under the deed of trust it was not until the last survivor of those entitled to receive income thereunder had died that the trustee can be said to have been directed to distribute to charities any part of the trust fund or income thereof remaining in the hands of the trustee."

This was in line with the opinion in *Boston Safe Deposit & Trust Co.* v. *Commissioner*, 66 F. (2d) 179, in which the same court had said (at p. 184):—

"We think the words 'or to be used' have no such significance as was given them in *Hartford-Connecticut Trust Co.* v. *Eaton* [36 F. (2d) 710]."

The soundness of the view taken in the Second Circuit appears from the opinion of this court in *Binney* v. *Long*, 299 U.S. 280 (delivered four days after the decision of the Circuit Court of Appeals in the case at bar). In the previous case of *Coolidge* v. *Long*, 282 U.S. 582, it was held that if, prior to the enactment of an inheritance tax law, a remainder became vested, the taking effect of the remainder in possession or enjoyment did not constitute a taxable occasion in spite of the fact that until the termination of the life estate the remainder was subject to be defeated by a condition subsequent. In *Binney* v. *Long*, on the other hand, the remainder interest was contingent until the termination of the life estate and it was held that the vesting of the remainder was therefore taxable, even though the trust was established much before the enactment of the tax law. If in the case at bar it lay in the option of the trustee to determine whether at the termination of the trust the estate should be applied to charitable

or to non-charitable uses, the case would be like *Binney* v. *Long* and it might be impossible to say that receipts of the trust, in the absence of action by the trustee, were "to be used exclusively" for charity. As it is, however, the case is exactly like *Coolidge* v. *Long;* since the charitable use attaches automatically to all receipts of the trust, such receipts are "to be used exclusively for charity," even though it is possible that they may through the operation of the condition subsequent be diverted to other purposes.

It is unnecessary, however, to rely entirely upon this principle, because the result would be the same even if the statute purported to deny the right to claim deduction with respect to sums to which there attached a charitable trust subject to a condition subsequent. It is well settled that under a statute of that kind the decisive question is not whether there exists in theory a condition subsequent, but whether in view of the particular facts there is any substantial prospect that the condition subsequent will ever take effect. If there is an overwhelming probability that the condition subsequent will never come into operation, it must be disregarded.

In *Ithaca Trust Co.* v. *United States,* 279 U.S. 151, this principle was applied to the provisions of the Revenue Act of 1918, §403 (a) (3), respecting estate taxes. Mr. Justice Holmes said (at p. 154):—

> "On June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Company executors, and the Ithaca Trust Company trustee of the trusts created by his will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum 'that may be necessary to suitably maintain her in as much comfort as she now enjoys.' After the death of the wife there were bequests in

trust for admitted charities. The case presents two questions the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under §403 (a) (3), *supra,* in order to ascertain the estate tax, cannot be allowed. *Humes* v. *United States,* 276 U.S. 487, 494. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator, and even after debts and specific legacies had been paid, was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

The principle thus followed is in line with the general law of administration. If a fund is transferred by an executor to a trustee on a given day, the beneficiary may not be heard to say that, because pending litigation might in a remote possibility so develop as to require a return of the property, the transfer should be deemed provisional only. In *First National Bank of Boston* v. *Truesdale Hospital,* 288 Mass. 35, the court said (at p. 41):—

"Truesdale Hospital contends that the establishment of the trust for it on May 22, 1931, was incomplete, tentative and provisional only. . . . True, the number of shares for division had not then been adjudicated by our earlier decision. [*First National Bank of Boston* v. *Union Hospital,* 281 Mass. 64.] But the division was based on principles subsequently decided to be correct. No party, in the earlier case before us, contended that

there were fewer than twenty-five thousand shares to be divided. . . . Any possibility of a decision that there were no shares to be divided was deemed very remote. The fact that the set up of a trust fund may conceivably be affected by an unexpected turn of events does not make it ineffective."

This principle has been successfuly invoked by the government in cases in which the question has been whether a legacy has vested in possession for purposes of taxation. For example, in *Henry* v. *United States*, 251 U.S. 393, it was contended by the taxpayer that, if a legacy was paid before the time for proving debts against the estate had expired, it could not be regarded as vested in possession until the end of that period. This contention was overruled, Mr. Justice Holmes saying (at p. 394) :—

"There is no doubt that if the claimant had retained the funds in his hands, as he had a legal right to do, the interest of the legatees would not have been vested in possession within the meaning of the statute, whatever the probabilities and however solvent the estate. *United States* v. *Jones*, 236 U.S. 106. *McCoach* v. *Pratt*, 236 U.S. 562. He contends that the same is true if he saw fit to pay over legacies before the time came when they could be demanded as of right. We will assume that, if the estate had proved insufficient, the executor not only would have been responsible but could have recovered such portion of his payments as was needed to pay debts. Still the consequence asserted does not follow. . . . The remote possibility that the funds in the hands of the legatees might have to be returned no more prevented their being vested in possession and taxable than the possibility that a life estate might end at any moment prevented one that began before July 1, 1902, being taxed at its full value

as fixed by the mortuary tables. *United States* v. *Fidelity Trust Co.*, 222 U.S. 158, 160."

So, in *Simpson* v. *United States*, 252 U.S. 547, it was held that the vesting of the legacies was not affected by the pendency of a suit for a large sum against the estate in the absence of evidence that the suit constituted a real threat. Mr. Justice Clarke said (at p. 552):—

"Obviously, such a showing of such a suit cannot be considered to have been a genuine obstacle to settlement of the estate, and the other claims against it were negligible in comparison with the available assets."

Again, in *Cochran* v. *United States*, 254 U.S. 387, the question was whether a tax law which became inoperative on July 1, 1902, applied to legacies paid before that date, if there existed on that day a theoretical possibility that the legatees might be called upon to refund in the event that the retained assets proved insufficient to pay all claims. Mr. Justice McKenna said (at p. 392):—

"We have seen the amount of taxes imposed by the statute was definite and the appellants had no trouble in estimating and returning the value of the legacies upon which it was imposed. The basis of the claim of uncertainty is that the estate was and is not settled and that there is a possibility that the legatees may be called upon to pay debts. The contention is as strained and baseless as that rejected in *Simpson* v. *United States, supra.*

* * * * * * * *

"While it is averred that the clear value of the interests of the legatees was at all times prior to July 1, 1902, uncertain and indefinite, and still is so, there stand in opposition the facts of the case and the refu-

> tation that an estate of the net personal value of nearly eight million dollars was or is in danger of embarrassment by the payment of legacies of less than one million dollars. And we have seen that the executors who had knowledge of the condition of the estate, and all that it might be made subject to, did not hesitate to make a return of the legacies to the Collector of Internal Revenue and pay the taxes thereon. The petition in this case was filed in the Court of Claims June 23, 1916, fourteen years after the commencement of the administration of the estate and nearly as long after the time of presentation of claims against it, and the record shows that the total of the claims and expenses of administration, including funeral expenses, amounts to the sum of $235,700. In the face of this exhibition we are asked to speculate upon possibility of the existence of liabilities that fourteen years have not developed."

If the government has succeeded in establishing the rule that the test of substantiality is to be applied when it works against the taxpayer, it cannot object to the use of the same test when it works in his favor.

Applying to the case at bar the test thus established, the result is plain. The capital value of the annuities was little more than $200,000, whereas the corpus of the trust estate taken at the depressed market values obtaining on December 31, 1931, was almost $1,500,000 (R. 54). The total of the annuities for that year was $22,900, while the net income of the trust (not including gains on sales) was $114,417. It was certain that the amount payable to the annuitants would steadily diminish; their average age was over sixty-five, three of them being, indeed, over seventy and one over eighty (R. 54).

Under the law of Massachusetts, where the settlor resided and where the trust is administered, annuities, even if charged both upon income and upon principal, must be paid so far as possible out of income unless the trust instrument provides otherwise.

> *Cummings* v. *Cummings*, 146 Mass. 501.
> *Tirrell* v. *Commissioner of Corporations & Taxation*, 287 Mass. 464.

"Income" for this purpose means income as determined in accordance with the ordinary principles of trust accounting and not income as defined by the income tax laws; hence any gains on sales in a case like the present may be diverted to non-charitable purposes only after all accumulated income, as well as all current income, has been exhausted. In *Williams* v. *Milton*, 215 Mass. 1, the court said (at p. 11):—

> "In case of a trust . . . any gain made by a change of investment is an accretion belonging to the corpus of the trust fund and belongs to those who own the corpus of the fund. Such gains become part of the corpus as much as the original money contribution to the trust fund."

So, in *Tax Commissioner* v. *Putnam*, 227 Mass. 522, it was held that gains on sales constituted "income" for the purposes of the Massachusetts income tax, but it was recognized (at p. 529) that as between trustee and beneficiary "profits and gains arising from the increase in value of investments and realized by sale are treated as a part of the principal and not as income."

In so far as the nature and incidents of a property right are material in determining questions arising under the

federal tax laws, the federal courts accept the state decisions as controlling.

Blair v. *Commissioner*, 299 U.S. — (Feb. 1, 1937).
Tyler v. *United States*, 281 U.S. 497.
Guffey v. *Smith*, 237 U.S. 101.

Unless there should come to pass some cataclysm which destroyed all property values and completely stalled the economic machinery,—a possibility which, of course, overshadows every financial arrangement, but which practical men treat much as they treat the corresponding possibility of being struck by a falling aeroplane,—it is hardly conceivable that it should ever become necessary to draw upon the excess income of 1931 or upon the principal in order to offset such a decline in the current income as should render it insufficient to cover the annuities. While the distinction is believed to be unimportant for the present purpose, it is to be noted that, in view of the rule established by the Massachusetts authorities cited above, the chance that the gains on sales which constitute a part of the "gross income" for tax purposes will ever become payable to the annuitants is even more remote than the chance that through a falling-off in current income it may become necessary to draw upon accumulations.

The purely theoretical nature of the possibility in question is further shown by the course of events since the close of 1931. The income of the trust (exclusive of profits) has greatly exceeded the amounts needed for the payment of the annuities and large distributions have been made to charity accordingly (R. 21, 42-44, 48-50). To adopt the language quoted above from the opinion of Mr. Justice McKenna in *Cochran* v. *United States*, 254 U.S. 387, the government cannot ask the court to speculate upon the possibility of untoward events which the years subsequent to 1931 have not developed.

Another important factor in the present case is that the settlor's primary purpose was to devote the trust property to charity in fulfillment of his brother's wishes and in perpetuation of the latter's memory. This appears from the opening recitals of the deed, from the request that any fund given by the trustees to a charitable institution be designated as "the Henry Clay Jackson Fund" (R. 24, 29, 34), from the careful directions with respect to selection of the charities to be aided (R. 30) and from the wishes of the settlor and of his brother as expressed to Arthur T. Johnson, Esq., who drafted the deed (R. 23, 45-50).

Finally, there is the vital consideration that the trustee, at all times since the establishment of the trust, has had it in its power to pay over to charity the entire trust fund with the exception of such amount,—say, $200,000,—as might be reasonably necessary to support the annuities (R. 20). In Massachusetts it is well settled that, if there is no provision in a trust instrument with respect to the source from which specified annuities are to be paid and the instrument provides for the distribution of the rest of the fund, the trustees should purchase annuities or reserve enough of the fund to yield an income sufficient to meet the periodical payments and should then distribute so much of the fund as is not needed for these purposes.

Williams v. *Thacher*, 186 Mass. 293, 300.
Bartlett, petitioner, 163 Mass. 509, 513.
Dexter v. *Episcopal City Mission*, 134 Mass. 394, 397.
Sears v. *Hardy*, 120 Mass. 524, 542.
Treadwell v. *Cordis*, 5 Gray, 341, 351.

It follows that, but for the clause giving the trustee in the present case discretion as to when and how distributions to charity shall be made, it might have been compelled upon application by the Attorney General at any time after the

first year forthwith to apply to charity the entire trust fund other than such part as might be adequate to support the annuities. Whatever may be the law in other States, it is settled in Massachusetts that a gift to charity in the most general terms will be enforced.

Kirwin v. *Attorney General,* 275 Mass. 34.
Weber v. *Bryant,* 161 Mass. 400.
Saltonstall v. *Sanders,* 11 Allen, 446.

The gift to charity must be deemed vested from the beginning even if the trustee is given a discretion as to its application, so that a considerable time may elapse between the establishment of the trust and its application to any particular charity.

Codman v. *Brigham,* 187 Mass. 309.
Minot v. *Baker,* 147 Mass. 348.
Brigham v. *Peter Bent Brigham Hospital* (C.C.A. 1) 134 Fed. 513.

It is, moreover, the law of Massachusetts that, if an annuity is charged upon a fund much larger than is necessary to support it and if the trustee is given discretion as to when the excess shall be distributed, this discretion is not absolute, and that, if the trustee holds back a sum manifestly excessive for that purpose, he will be compelled to make distribution. In a situation like the present, therefore, the Attorney General may compel a distribution to charity of part of the trust fund if the trustee assumes unreasonably to withhold the distribution of excess income or principal. An attempt to withhold all excess income and all principal until the death of the last annuitant could not be justified.

Williams v. *Bradley,* 3 Allen, 270, 285.
Wilson v. *Wilson,* 145 Mass. 490, 492.

Corkery v. *Dorsey*, 223 Mass. 97, 101.
Boyden v. *Stevens*, 285 Mass. 176, 179.

All these considerations go to increase the unlikelihood that the sums now in question will ever be diverted from the charitable use through the operation of the condition subsequent and to show that the existence of the condition subsequent does not, in the actual circumstances, constitute a ground for saying that these sums are not "to be used exclusively" for charity.

It follows that all of the sums comprised in the gross income of the estate for 1934 (less the amount paid to annuitants, etc.), constituted income "to be used exclusively" for charitable purposes and so would not have been taxable, even if there had been no actual payments or appropriations during that year.

It is accordingly submitted that the decree of the Circuit Court of Appeals should be reversed and the case remanded to the Board of Tax Appeals with instructions to reinstate the petitioner's return subject to the minor adjustments (R. 19, 23, 55, 62) to which it now agrees.

FRANCIS V. BARSTOW,
HAROLD S. DAVIS.